Ralphs Grocery Company *and* United Food and Commercial Workers Union, Local 324. Case 21–CA–039867

July 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On April 30, 2013, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel and Charging Party each filed an answering brief. The Charging Party also filed exceptions and a supporting brief, to which the Respondent filed an answering brief and the Charging Party filed a reply brief. The General Counsel filed limited cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[1] and to adopt the recommended Order as modified.[2]

We agree with the judge that the Respondent violated Section 8(a)(1) by requiring Vittorio Razi to submit to a drug and alcohol test notwithstanding his request for representation, and by suspending and discharging Razi for his refusal to take the test without representation. Because the reason for Razi's suspension and discharge is inextricably linked to his assertion of *Weingarten* rights,[3] with which the Respondent unlawfully interfered, we find that the judge's make-whole remedy is appropriate.

As found by the judge, it is undisputed that, as in *Safeway Stores*, 303 NLRB 989 (1991), the Respondent took disciplinary action against Razi for refusing to take the drug and alcohol test as ordered. There is also no question that Razi refused to take the test because he wished to consult with a union representative beforehand. Razi asked for representation and, despite the Re\spondent's mistaken assertions that he did not have such right, attempted—unsuccessfully—to contact a representative by phone. Rather than wait to see if a representative would become available, the Respondent immediately suspended and subsequently discharged Razi.

The Respondent argues that Razi's refusal to take the drug and alcohol test was grounds for discipline because it constituted both insubordination and an automatic positive test result, as reflected in his termination notice. Because there is simply no way to divorce Razi's refusal from his assertion of his *Weingarten* rights, this argument is not a valid defense. The drug and alcohol test, ordered as part of the Respondent's investigation into Razi's conduct, triggered Razi's right to a *Weingarten* representative. *Safeway Stores*, above; *System 99*, 289 NLRB 723 (1988). As Razi's refusal to submit to the test without the benefit of representation was an exercise of that right, his refusal could not lawfully be used against him. By relying on Razi's refusal to take the test as a basis for discipline, the Respondent penalized Razi for refusing to waive his right to representation, irrespective of whether it considered his refusal to be insubordination or an automatic positive test result. In these circumstances, it is clear that Razi's suspension and discharge were a direct result of his invocation of his *Weingarten* rights and, therefore, reinstatement and backpay are warranted. *Safeway Stores*, above.

Our dissenting colleague emphasizes that the Respondent had a legitimate interest in conducting its investigation and taking action without delay, particularly given the time-sensitive nature of sobriety tests. We agree that all employers have a legitimate interest in promptly addressing situations where employees may be working under the influence of drugs or alcohol. That interest, however, does not privilege employers to take action against employees based on their invocation of their Section 7 rights. Here, although the investigation was triggered by the Respondent's observations of Razi's behavior, the Respondent did not take disciplinary action based "on the information it already had," as our dissenting colleague suggests. As the judge observed, the Respondent made no reference in its termination report to Razi's observed behavior or conduct before or during the meeting, and it made no finding, apart from his refusal to take the sobriety test, that he was under the influence of intoxicants. Compare *System 99*, above at 732 fn. 3 (denying full remedy because respondent discharged employee based on signs of his intoxication and its interpretation of employee's conduct as refusal to take sobriety test). Rather, as described, the Respondent disciplined and discharged Razi based solely on his protected refusal to submit to a drug and alcohol test without the assistance

[1] The General Counsel requests that the Board adopt a new framework for considering postarbitration deferral cases, in accordance with GC Memorandum 11-05. Because we adopt the judge's decision not to defer to the arbitrator's decision and award on grounds of repugnancy under the current deferral standards, we find it unnecessary to consider the request in this case.

[2] We shall modify the judge's recommended Order to conform to the violations found and substitute a new notice to conform to the Order as modified, the Board's standard remedial language, and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014). We deny the Union's request for an award of its arbitration expenses.

[3] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

of a *Weingarten* representative.[4] Thus, this case stands in stark contrast to *YRC Freight*, 360 NLRB 744 (2014), cited by our colleague, where the employer relied on information it already had prior to the employee's invocation of his *Weingarten* rights.[5]

But even assuming, as our dissenting colleague contends, that the Respondent was free to immediately proceed with the test and to rely on Razi's refusal as evidence of intoxication, the Respondent has not demonstrated that it would have disciplined Razi on that basis alone. As the judge noted, the arbitration transcript contained testimony that Razi "was terminated for insubordination, not for being under the influence," and the Respondent's counsel made the following statement: "if it weren't for the refusal of the grievant to take the drug test, we would [not] be here today . . . ." The Respondent's assertions that Razi was disciplined, in part, because his refusal constituted insubordination demonstrate that the Respondent treated Razi's exercise of his *Weingarten* rights as a punishable offense, independent of his presumptive intoxication. As the judge concluded, the Respondent presented no evidence that it would have discharged him in the absence of its impermissible reliance on his purported insubordination; i.e., his refusal to take the drug and alcohol test. Thus, even if we were to accept Razi's presumptive intoxication as a valid reason for discipline, we would still find the suspension and discharge unlawful. *T.N.T. Red Star Express*, 299 NLRB 894, 895 fn. 6 (1990); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ralphs Grocery Company, Irvine, California, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified by substituting the following for paragraph 2(d).

"(d) Within 14 days from the date of the Board's Order, remove from its files any reference to Razi's unlawful suspension and discharge, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way."

MEMBER JOHNSON, dissenting in part.

I agree with my colleagues that the Respondent unlawfully interfered with Vittorio Razi's *Weingarten* rights when it insisted he submit to the drug and alcohol test notwithstanding his request for representation, and treated his refusal as insubordination.[1] Contrary to the majority, however, I conclude that Razi was suspended and discharged because of the Respondent's belief that he was intoxicated, not due to any hostility toward his request for union representation and, therefore, that the suspension and discharge were not unlawful and a make-whole remedy is not appropriate.

As found by the judge, having observed Razi exhibiting strange behavior, the Respondent's store director concluded that Razi was under the influence of some substance. She instructed Razi to submit to a drug and alcohol test and informed him that a refusal to do so would be considered an automatic positive test result, as well as insubordination. Razi immediately refused and requested to speak to a union representative. He was informed that he was required to immediately submit to the test without consulting a union representative, in derogation of his *Weingarten* rights. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). However, he was allowed to contact a representative. As there was no representative on duty at the time, Razi attempted to reach one by phone. After some time had passed and Razi was unable to reach a representative, he was informed that he could either take the test without a representative or forego the test, which, under the Respondent's policy, would be considered as an automatic positive test result and cause for discharge. Razi declined to take the test.

Contrary to the judge, I find that under these circumstances, the Respondent was not required to postpone its investigation indefinitely simply because, through no fault of its own, it was unable to comply with Razi's request for representation. The Respondent had a legitimate interest in proceeding with its investigation without delay, particularly in light of the time-sensitive nature of sobriety test results. *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977); accord: *Weingarten*, above (the exercise of *Weingarten* rights may not interfere with legitimate employer prerogatives). Without knowing when a representative might become available,

[4] Our dissenting colleague errs in asserting that our decision provides no guidance to employers faced with similar circumstances. Assuming no improper motivation, an employer lawfully may act based on its observations of an employee's behavior, or any other evidence, indicating that the employee may be working under the influence of drugs or alcohol. The employer need only ensure that if an employee invokes his Sec. 7 right to a *Weingarten* representative, his right will be respected and not used as the predicate for discipline.

[5] Member Schiffer dissented in *YRC Freight*, and for the reasons expressed there she believes that case was wrongly decided. Nevertheless, she agrees the present case clearly is distinguishable from *YRC Freight*.

[1] In light of the *Weingarten* issue, I agree with the judge and my colleagues that deferral to the arbitrator's award is not appropriate.

the Respondent was privileged to act on the information it already had (its observations of Razi, which gave rise to a presumption of his intoxication that could only be refuted by a negative test result) and to construe Razi's refusal to take the test as an automatic positive test result in accordance with its established practice. *YRC Freight*, supra at 746 (citing *Weingarten*, above). There is no indication that the "automatic positive" policy was not established, nor is there any allegation that it was applied discriminatorily. To dispute, as the majority does, that the Respondent relied on its observations of Razi in applying this policy is to completely ignore the basic fact that Razi's behavior was the very genesis of the investigation. Although my colleagues concede that the Respondent had a legitimate interest in addressing Razi's presumptive intoxication, they have provided no guidance or indication as to how they believe the Respondent should have proceeded. In the absence of any evidence that the Respondent was unlawfully motivated by Razi's *Weingarten* request, I would find that his suspension and discharge did not violate Section 8(a)(1). See *System 99*, 289 NLRB 723, 723 fn. 3 (1988). Accordingly, I would find that a make-whole remedy is not appropriate. *Taracorp Inc.*, 273 NLRB 221, 223 fn. 12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation.") (citing *Garment Workers ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975)).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you to submit to a drug and alcohol test as part of an investigation into your behavior or conduct notwithstanding your request to consult with a union representative beforehand.

WE WILL NOT suspend, discharge, or otherwise discriminate against you because of your refusal to submit to such a drug and alcohol test without first consulting with a union representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Vittorio Razi full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Razi whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Razi for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Razi's unlawful suspension and discharge, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

RALPHS GROCERY COMPANY

The Board's decision can be found at www.nlrb.gov/case/21–CA–039867 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Ami Silverman, Esq., for the General Counsel.
Timothy F. Ryan, Esq. and *Aurora V. Kaiser, Esq. (Morrison & Foerster LLP)*, for the Respondent Company.
Joshua F. Young, Esq. (Gilbert & Sackman), for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. In May 2011, Ralphs Grocery Company suspended and terminated Vittorio Razi, a longtime bargaining unit employee at its Irvine, California store, after he refused to take a drug test without first consulting with his UFCW Local 324 representative. Razi immediately filed a grievance over the matter with the Union, which notified the Company the same day that it was contesting Razi's suspension and termination under the provisions of the parties' collective-bargaining agreement. Approximately 6 weeks later, the Union also filed a charge with the NLRB Regional Office, alleging that the Company's actions violated the National Labor Relations Act. Specifically, the charge alleged that Razi had a *Weingarten* right to confer with a union representative, and that the Company unlawfully refused to permit him to do so and terminated him for asserting this right.[1]

The Regional Office initially postponed processing the charge, pursuant to the Board's pre-arbitral deferral policy,[2] to allow the parties an opportunity to resolve the dispute through their contractual grievance-arbitration procedures.[3] However, approximately a year later—after the grievance-arbitration hearing was held and the arbitrator issued his decision finding "just cause" for Razi's termination—the Regional Office resumed processing the charge and issued the instant complaint. As most recently amended on January 24, 2013, the complaint alleges that the Company violated Section 8(a)(1) and/or (3) of the Act by denying Razi's request to be represented by the Union during an interview he reasonably believed would result in disciplinary action; by beginning the interview after denying Razi's request; and by thereafter suspending and terminating Razi because he refused to complete the interview without union representation.

The Company's answer denies all of the foregoing allegations. Moreover, it asserts that the Board should defer to the arbitrator's May 5, 2012 decision under the relevant standards for post-arbitration deferral. Accordingly, it requests that the complaint be dismissed in its entirety.

On March 18, 2013, the parties filed a joint motion requesting that I issue a decision in the case based solely on a stipulated record, including the parties' pleadings and stipulations of fact, the transcript and exhibits from the grievance-arbitration hearing, and the arbitrator's decision.[4] I granted the joint motion by order dated March 19,[5] and the parties subsequently filed their briefs on April 23.

I. THE DEFERRAL ISSUE

Whether the Board should defer to the arbitrator's decision is a threshold issue that must be addressed before considering the merits of the complaint allegations.[6] The relevant standards are set forth in *Olin Corp.*, 268 NLRB 573 (1984). The Board will defer to an arbitrator's decision if (1) the proceedings appear to have been fair and regular; (2) all parties agreed to be bound; (3) the arbitrator has adequately considered the unfair labor practice issue, i.e., the unfair labor practice issue is factually parallel to the contractual issue and the arbitrator was presented generally with the facts relevant to resolving it; and (4) the arbitrator's decision is not clearly repugnant to the Act, i.e., it is susceptible to an interpretation consistent with the Act. The burden is on the party opposing deferral to establish that deferral is inappropriate.[7]

Here, there is no dispute, and I find, that the first three criteria are satisfied. However, for the reasons set forth below, in agreement with the General Counsel and the Union, I find that the arbitrator's decision is clearly repugnant to the Act.

A. The Arbitrator's Factual Findings[8]

At the time of the relevant events, Razi had worked for the Company for about 24 years, since 1987, and had been the produce manager at the Irvine store since 2003.[9] He also did woodworking (building or refurbishing produce tables and racks) for the Company out of his garage. He was considered an excellent employee, with outstanding customer service skills, and had no history of disciplinary actions related to substance abuse or insubordination.

On May 15, 2011, Razi worked a 12-hour shift, including time he spent bringing woodworking to the store. He also worked a long, 14-hour shift, counting breaks, on May 16. The following day, May 17, he was not scheduled to work, but went to the store to take a measurement for a woodworking project that a district produce supervisor had requested. He worked on the project later that evening beginning around 9:30 or 10 p.m., and continuing into the next morning, May 18, until about 2 or 2:30 a.m. Nevertheless, despite having had very little sleep,

[1] See *NLRB v. J. Weingarten*, 420 U.S. 251, 261 (1975) (employees have a right under the Act to union representation at an investigatory interview they reasonably believe may result in discipline).

[2] See *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies*, 268 NLRB 557 (1984).

[3] The Union appealed the Regional Office's determination to the NLRB General Counsel's Office of Appeals in Washington, D.C., but the appeal was denied.

[4] See Sec. 102.35(a)(9) of the Board's Rules. Jurisdiction is uncontested and well established by the admitted complaint allegations and stipulated facts.

[5] On April 19, I granted the parties' joint motion to amend the stipulation to include the joint exhibits in the arbitration, which were inadvertently omitted from Exh. 10 to the stipulation.

[6] See, e.g., *E. I. du Pont & Co.*, 293 NLRB 896 fn. 2 (1988); *Transport Service Co.*, 282 NLRB 111 fn. 4 (1986); *L. E. Myers Co.*, 270 NLRB 1010 fn. 2 (1984); and *Bio-Science Laboratories*, 209 NLRB 796 fn. 3 (1974). See also *IAP World Services*, 358 NLRB 33, 33 fn. 2 (2012), and cases cited there.

[7] See also *Utility Workers Local 246 v. NLRB*, 39 F.3d 1213 (D.C. Cir. 1994); and *Garcia v. NLRB*, 785 F.2d 807 (9th Cir. 1986) (discussing the Board's *Olin* standards).

[8] The following is a summary of the factual findings made by the arbitrator based on the admissions and credited evidence presented at the hearing. See *Louis G. Freeman Co.*, 270 NLRB 80, 81 (1984). ("[U]nless an examination of the record evidence before the arbitrator reveals facial error in the arbitrator's factual findings," the determination of whether the arbitrator's decision is clearly repugnant to the Act "should be made based on the facts [the arbitrator] has found on that record."). See also *Teledyne Industries*, 300 NLRB 780, 782 (1990), affd. 157 LRRM 2896 (9th Cir. 1992).

[9] Notwithstanding his job title, there is no dispute that Razi is in the bargaining unit represented by the Union.

Razi reported for his next work shift at the store a few hours later, shortly after 5 a.m.

Assistant Store Director Edward Maier arrived about an hour later, around 6 a.m., and encountered Razi in the store's computer room. Razi appeared agitated, anxious, and nervous, his speech was slurred, and he was unable to sign onto the computer or print new signs showing produce prices. Maier subsequently reported his observations to Store Director Julie Henselman when she arrived around 7 a.m., and advised her to "go check out" Razi.[10]

Henselman found Razi stocking produce. However, he was doing so in a manner that was too fast and risked bruising. Further, when she spoke to him, he was anxious and fidgety, would not look her in the eyes, spoke rapidly and in an animated fashion, and had trouble focusing on one topic at a time. In addition, when he knelt down at one point to tie his shoes, it took him several attempts to accomplish it.

After Henselman finished speaking to Razi, the frozen food manager approached her and also reported that Razi had been acting strangely that morning. Henselman then spoke to a number of other employees as well, several of whom reported similar observations.

Henselman concluded that Razi was under the influence of some type of substance, and called Senior Labor Relations Representative William Edwards to discuss the situation. Edwards advised Henselman that, based on the circumstances she described, she had the right to compel Razi to take a drug and alcohol test, and suggested that she send him to take such a test.[11]

It was now about 9:15 a.m. Henselman called Maier to the office and asked him to drive Razi to the testing site. She also called Razi to the office and told him that he was going to be sent for a drug test based on the behavior he had exhibited. Razi responded that he did not do drugs, was insulted by the accusation, and would not take such a test. Henselman told Razi that his refusal to take the test would be grounds for immediate suspension and termination because it would constitute both insubordination and an automatic positive test result.

Razi at that point said he wanted to contact a union representative. Henselman responded that Razi did not have the right to have a union representative present, but permitted him to try and contact one. Razi then went downstairs and attempted to call his union representative, Linda Martinez. However, he was unable to reach her.

After about 10 or 15 minutes had passed, Henselman asked Maria Rodriguez, the front-end manager, to find Razi and bring him back to the office. Rodriguez found Razi outside the store and told him Henselman wanted him to return. Razi replied that he had to clock out first for lunch because it was his fifth hour on the job. (Employees are required to clock out after their fifth hour so that the Company does not incur a meal penalty.) Rodriguez told Razi not to punch out because he was needed in the office, but Razi went ahead and did so. He and Rodriguez then walked back up to the office. When they arrived, Rodriguez informed Henselman that Razi had clocked out, and Henselman clocked Razi back in.

Henselman then again told Razi that he needed to submit to a drug and alcohol test, and that a refusal to do so could be grounds for immediate termination. However, Razi continued to refuse, stating that he had not been able to get in touch with anyone, and that he was going on his lunchbreak. Henselman replied that he could not take a break in the middle of the meeting, and repeated that he needed to submit to a drug and alcohol test. She told Razi that he had 1 minute to meet Maier at his car, or he would be immediately suspended. Razi replied that he would go with Maier, but would not take the test once they arrived at the testing site.[12]

Henselman at that point again called Edwards and explained the situation to him; that Razi could not get in touch with his union representative, so he would not take the test (Tr. 94). Edwards advised Henselman to suspend Razi pending further investigation. Henselman thereupon did so, advising Razi not to return to the store until he was called. Maier then escorted Razi out of the store.

The Company called Razi back in and terminated him the following day. The termination report, which Henselman drafted, stated that Razi

> was terminated for insubordination and refusal to take a drug test. He was told not to clock out by Maria Rodriguez, and he did anyway, which is insubordination. He also refused to take a drug test, which is also insubordination, and an automatic 'positive' test result" (ER Exh. 3).[13]

B. The Arbitrator's Analysis and Opinion

The arbitrator rejected the first ground cited in the termination report (that Razi insubordinately ignored Rodriguez' order not to clock out before going back to the office). He found that, although Rodriguez was the front-end manager, she was also a union steward and did not supervise Razi. Moreover, he found that, even assuming Rodriguez had the authority to give any directives to Razi, there was no evidence that she issued him a clear order not to punch out or warned him of the disciplinary

[10] The Company admits in this proceeding that both Henselman and Maier are supervisors within the meaning of Sec. 2(11) of the Act.

[11] As indicated in the arbitrator's decision (pp. 2, 12), the collective-bargaining agreement does not contain any provisions regarding drug testing; however, the Union's field director, Chuck Adinolfi, testified that the Union has not opposed the Company performing probable cause testing, preemployment testing, and postaccident testing.

[12] The arbitrator made no findings, and the record does not reveal, how far the testing site was from the store or how much time it would have taken to drive there. Maier testified only that it was a health facility, which he believed was also in Irvine (Tr. 40).

[13] The arbitrator credited testimony by a district manager, Nick Haynes, that, as he was escorting Razi out of the store on May 19, Razi asked, "What would you have done if I'd brought my shotgun to this meeting?" Haynes subsequently told someone in the labor relations department about the remark, and was instructed to document it by filing a police report, which he did. However, Haynes testified that he did not consider the remark a threat, did not feel threatened, and, having known Razi for many years, took it as one of the occasional odd comments that Razi made. Further, it does not appear from the stipulated record that the Company ever argued that Razi's posttermination remark was relevant to the issues before the arbitrator, and the arbitrator did not address the matter in his analysis. Nor has the Company raised the matter in this proceeding, either with respect to the merits or the appropriate remedy.

consequences for failing to comply.

However, the arbitrator found that the Company had good cause to terminate Razi based on his refusal to take the drug test. Although the arbitrator agreed with the Union that it was "at least plausible," given Razi's work schedule, that his observed behavior on May 18 was caused by fatigue rather than substance abuse, he found that the Company had sufficient reason to require Razi to take a drug test. He further found that Razi's undisputed refusal to take the test was insubordinate, as the Company had clearly and repeatedly ordered him to take the test and communicated the consequences of failing to do so.

In so finding, the arbitrator rejected the Union's contention that Razi had a *Weingarten* right to consult with a union representative before submitting to the drug and alcohol test. First, the arbitrator found that the "two meetings" on May 18 did not constitute investigatory interviews under *Weingarten* because Henselman had already decided to send Razi for a drug test based on her own observations and investigation of Razi's behavior that morning; the purpose of the meetings was not to gather any new facts, but simply to inform Razi that he was being required to take the test; and Henselman did not, in fact, ask Razi any questions, other than whether he would take the test, after he requested to contact his union representative.

Second, the arbitrator rejected the Union's argument that the Company's order to take a drug test itself triggered *Weingarten* because it was part of an inquiry into Razi's conduct. Contrary to the Union's contention, he concluded that the Board's decision in *System 99*, 289 NLRB 723 (1988), was not controlling. In that case, the employer formed the impression that an employee was intoxicated,[14] summoned the employee to a meeting, and told him that he was being requested to take a sobriety test and would be fired if he refused to do so because the refusal would constitute a presumption of drunkenness under the contract. The employee protested and requested to speak privately with a designated representative, but the employer denied his request and terminated him. The Board found the employer's refusal to permit the employee to consult with his designated representative was unlawful under *Weingarten*.

The Union argued that the facts here are essentially indistinguishable from *System 99*. However, the arbitrator disagreed, stating:

> [I]n *System 99*, the employer's statements to the employee about the drug test were always framed as *questions*. The [Board] concluded that a primary purpose of the questions was to determine, or prove, whether the employee was intoxicated *based on his answers*. Here, [Razi] was given an *order*, on multiple occasions, to submit to the test. The purpose of issuing this order was to get [Razi] to submit to the test – not to gather independent, additional evidence by evaluating his response.

The arbitrator also distinguished a subsequent case cited by the Union, *Safeway Stores*, 303 NLRB 989 (1991). In that case, the employer launched an inquiry into an employee's record of absenteeism. As the first step in that inquiry, the employer decided to give the employee a drug test to see if his absences were related to substance abuse. Accordingly, when the employee arrived at work, he was called into the office and told that he would be given a drug test because of his absences. The employee protested and requested union assistance. However, the employer denied his requests and told him he would be suspended if he did not take the drug test on the spot. The employee replied that he would not take the test without union representation, and the employer thereupon suspended him. In finding the suspension unlawful, the Board stated that it did "not pass on" whether "a drug test, standing alone, would constitute an investigatory interview under *Weingarten*." However, it emphasized that the drug test ordered there "was part of an inquiry into [the employee's] absence record," and that the employer "was, in effect, penalizing [the employee] for claiming *Weingarten* rights with respect to the larger controversy."

The Union argued that the Board's foregoing statements in *Safeway* were intended to distinguish between random drug testing that is not connected to any particular disciplinary investigation (which the Board did not pass on) and targeted, suspicion-based investigatory drug testing (which the Board held does trigger such rights). However, the arbitrator concluded that this was insufficiently clear. Further, he found that the circumstances were factually distinguishable, as the Company here "was not conducting any analogous broader investigation into [Razi's] conduct beyond his behavior on the date in question."

Finally, the arbitrator stated that he was

> mindful of the fact that, as the Employer correctly notes, drug and alcohol screenings are time sensitive. A delay in the screening process has the potential to compromise the testing results. The Employer was not required to wait indefinitely until [Razi] was able to reach Martinez when it possessed reasonable suspicion that [Razi] was under the influence of drugs or alcohol, and it was entitled to require [his] submission to a drug screen test in a timely manner to ascertain whether its suspicions were verified. While there is no evidence that [Razi's] motive in requesting a Union representative was to delay the test in order to interfere with the results, the Employer's actions were nevertheless reasonable.

C. Deferral to the Arbitrator's Decision

In agreement with the General Counsel and the Union, I find that the arbitrator clearly erred in finding that Razi did not have a right under the Act to consult with a union representative before submitting to the drug test.

Contrary to the arbitrator, the Board's decision in *System 99* is not distinguishable on the ground that "the employer's statements to the employee about the drug test were always framed as questions." Indeed, the Board twice stated that the statements were "implicit questions" (whether the employee would agree to take a sobriety test)—which obviously indicates that they were not explicit questions. And the Board several times referred to the employer's statements as "requests" to take a

[14] According to the employer's subsequent termination memo, the employee arrived at work "behaving in an incoherent manner, slurring [his] speech and smelling of alcohol," and "after questioning [him], it was management's opinion that [he] was unable to perform the functions of [his] job and could have possibly injured [himself] or someone else in the workplace if allowed to continue to work."

sobriety test. This was consistent with the employer's own termination notice, which stated that the employee had been "requested" to take the test. Moreover, as here, the employer's "request" was coupled with a threat of termination for refusing.

Safeway Stores likewise cannot reasonably be distinguished from this case. In both cases, the drug test was ordered as part of an investigation into employee conduct. Contrary to the arbitrator, it makes no rational difference that the employer in *Safeway Stores* was investigating why the employee was not showing up on schedule to perform his work, whereas the Company here was investigating why Razi was having difficulty performing his work.

In any event, even if there were a real or rational basis for the distinctions cited by the arbitrator in each case, they are refuted by the facts of the other. Thus, even assuming that all of the employer's statements to the employee were phrased as questions in *System 99*, they were not in *Safeway Stores*, i.e., like here, the employer told the employee that he was being required to take the test. And even assuming that there is a rational difference between the type of investigation here and in *Safeway Stores*, it is identical to the type of investigation in *System 99*, i.e., the employer there was likewise investigating the employee's demeanor at work on the day in question. Yet the Board found that the employee's *Weingarten* right to consult with a union representative was violated in both cases.

The arbitrator also clearly erred in finding that the Company was not required to delay the drug test because Razi was unable to reach his union representative. It is well established that, when faced with a legitimate request for union representation, an employer is entitled to proceed with the investigatory interview without significant delay only if a union representative is available. See, e.g., *Las Palmas Medical Center*, 358 NLRB 460, 473 (2012) ("*Weingarten* does not require an employer to postpone an interview because the specific union representative the employee requests is absent, so long as another union representative is available at the time set for the interview"); *Buonadonna Shoprite*, 356 NLRB 857 (2011) (employer was not required to delay an interview with an employee until his union representative was available, inasmuch as a shop steward who typically served as the union representative was available); *Roadway Express, Inc.*, 246 NLRB 1127, 1129–1130 (1979) (employer was not required to delay an interview until the employee's chosen representative was available, inasmuch as an alternate committeeman was available whom the union had specifically appointed so that no night-shift employee would be without representation if the need arose). If no union representative is available, the employer must either discontinue the interview or offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all (in which case the employer is free to take disciplinary action based on information obtained from other sources). See, e.g., *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); and *Super Valu Stores, Inc.*, 236 NLRB 1581, 1591 (1978).

Here, it was uncontroverted that Razi was unable to reach Martinez, the union representative for the store, and the arbitrator made no finding otherwise. Nor was there any evidence or finding by the arbitrator that an alternative union representative was available. The uncontroverted testimonial and documentary evidence indicated that the chief union steward, Joseph Terranova, had clocked out at 8:47 a.m. and left the store between 9:15 and 9:30 a.m. on May 18. (Tr. 167, 173–174, 258, 165, 282; ER Exh. 5.)[15] And while the Company apparently argued (as it does again here, Br. at 12), that Rodriguez could have served as Razi's *Weingarten* representative (even though it simultaneously argued that Rodriguez was acting as its agent in her capacity as the front-end manager),[16] there was no record support for this argument, i.e., there was no evidence that Rodriguez was "ready, willing, and able" to serve as Razi's union representative. *Pacific Gas & Electric Co*., 253 NLRB 1143, 1144 (1981).

The right to representation at investigatory interviews contemplates a "knowledgeable" union representative (*Weingarten*, 420 U.S. at 262) who can provide "advice and active assistance" to the employee (*Washoe Medical Center*, 348 NLRB 361 (2006), quoting *Barnard College*, 340 NLRB 934, 935 (2003)). See also *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 275 (4th Cir. 2003), cert. denied 124 S.Ct. 1876 (2004); *Postal Service*, 351 NLRB 1226 (2007); and *System 99*, 289 NLRB at 727. There was no evidence whatsoever that Rodriguez fit this bill. On the contrary, the Union's field director, Chuck Adinolfi, testified that, while stewards sometimes serve as an employee's witness during a meeting with management and are trained to make sure that employees know and exercise their *Weingarten* rights, they are instructed *not* to act as the *Weingarten* representative where the interrogation could lead to discipline or discharge (Tr. 271–272, 277–279).[17] Neither Rodriguez nor anyone else testified differently. Indeed, Rodriguez, who gave a statement to the Company shortly after Razi was terminated,[18] and was called as a witness by the Company,

[15] The record indicates that Terranova likely left the store closer to 9:15 a.m., inasmuch as he mistakenly testified that he did not clock out until 9 a.m. (Tr. 173). His timecard indicates he actually clocked out 13 minutes earlier. In any event, it is uncontroverted that Razi did not make his first call to Union Representative Martinez until 9:33 a.m.

[16] See Company counsel's opening statement to the arbitrator (Tr. 13). (Razi disobeyed "an order from a front-end manager that instructed him not to try to clock out in the middle of this whole process when he was being talked to about the drug test") and tr. 16 ("[Henselman] sent someone to find him; the front-end manager, [Rodriguez]. And she said, 'They're waiting for you upstairs. Go upstairs and continue your conversation.' He said, 'No. I'm going to clock out.'"). Cf. *Columbia Portland Cement Co.*, 294 NLRB 413 (1989), enfd. in part and remanded in part on other grounds 915 F.2d 253 (6th Cir. 1990) (presence of union president at investigatory meeting with employee did not satisfy *Weingarten* because he was not present in his capacity as a union representative but as a fellow employee charged with misconduct).

[17] Adinolfi acknowledged that some stewards with a "much higher level of understanding and participation than others" have been granted permission to act as a representative in some cases; however, he did not know whether Rodriguez was such a steward. Indeed, he testified that he had never heard that Rodriguez was "the No. 2 steward" at the store until the hearing (Tr. 279).

[18] Among other things, Rodriguez reported that, after Henselman asked her to locate Razi, she found him outside the store "talking on his cell phone on company time," and that he "ignored me" when she re-

did not even mention her status or duties as a union steward (she was never asked), and acknowledged that she returned downstairs immediately after bringing Razi back to the office as Henselman requested (Tr. 129). And, again, the arbitrator did not discredit Adinolfi or find (explicitly or implicitly) that Rodriguez could have served as Razi's *Weingarten* representative.

Finally, it is likewise clear, as the arbitrator found, that the Company terminated Razi because he refused to immediately submit to a drug test without first consulting his union representative. There is no mention whatsoever in the Company's termination report of Razi's observed behavior or conduct before or during the meeting, and no finding, apart from his refusal to take the drug test (which was considered an automatic positive test result), that he was under the influence of intoxicants or drugs (even though that was specifically listed as a possible basis for immediate termination on both the termination form and the posted rules and regulations). (See ER Exhs. 1 and 3.) See also Edwards' testimony (Tr. 119) (Razi "was terminated for insubordination, not for being under the influence").[19] Nor did the Company contend or present any evidence that it would have discharged Razi anyway based on that behavior or conduct absent his refusal to immediately take the drug test. See Company counsel's opening statement to the arbitrator (Tr. 14) ("if it weren't for the refusal of the grievant to take the drug test, we would [not] be here today. . ."). Thus, as in *Safeway Stores*, "[t]he nexus between the statutory right and the discharge is clear" (303 NLRB at 990). The discharge was therefore clearly unlawful. See also *Wal-Mart Stores, Inc*., 351 NLRB 130, 133 (2007); and *Provider Services Holdings, LLC*, 356 NLRB 1434 (2011).

As indicated by the Company, in evaluating whether an arbitrator's award is clearly repugnant to the Act, the Board does not require the award to be "totally consistent with Board precedent." *Olin*, 268 NLRB at 574. See also *Smurfit-Stone Container Corp*., 344 NLRB 658 (2005); *Aramark Services*, 344 NLRB 549 (2005); *Motor Convoy*, 303 NLRB 135 (1991); *Dennison National Co*., 296 NLRB 169 (1989); and *Postal Service*, 275 NLRB 430 (1985). However, in this instance, the arbitrator's decision was totally inconsistent with Board precedent, and cannot reasonably be interpreted consistent with the fundamental purposes of the Act. See *Weingarten*, 420 U.S. at 261 (protecting and enforcing an employee's right to union representation at an interview that may put his job in jeopardy "plainly effectuates the most fundamental purposes of the Act").[20] Accordingly, the General Counsel and the Union have met their burden, and deferral is inappropriate. See *Mobil Oil Exploration*, 325 NLRB 176 (1997), enfd. 200 F.3d 230 (5th Cir. 1999); *110 Greenwich Street Corp*., 319 NLRB 331 (1995); *Bath Iron Works Corp*., 302 NLRB 898, 902 (1991); *Cone Mills Corp*., 298 NLRB 661, 666 (1990); *Teamsters Local 70 (Emery Worldwide)*, 295 NLRB 1123, 1133 (1989); *Sherwood Diversified Services*, 288 NLRB 341, 342 (1988); *Key Food Stores*, 286 NLRB 1056 (1987); and *Garland Coal & Mining Co*., 276 NLRB 963 (1985).[21]

II. THE ALLEGED UNFAIR LABOR PRACTICES

As indicated above, the parties stipulated that all issues raised in this case should be resolved on the arbitration record. No additional evidence has been presented. Thus, for essentially the same reasons discussed above that the arbitrator's decision upholding the Company's actions is clearly repugnant to the Act, I find that the Company's actions violated Section 8(a)(1) of the Act as alleged. Although the complaint alleges that Razi's suspension and discharge violated Section 8(a)(3) as well as Section 8(a)(1), it is unnecessary to address this allegation as it would not materially affect the remedy. See *Provider Services Holdings*, supra at 1434 fn. 3.

CONCLUSIONS OF LAW

1. The arbitrator's May 5, 2012 decision that Ralphs Grocery Company had just cause to terminate Viittorio Razi for insubordinately refusing to immediately submit to a drug and alcohol test without first consulting with a UFCW Local 324 representative is clearly repugnant to the Act, and deferral to that decision is therefore inappropriate.

2. By requiring Razi to immediately submit to a drug and alcohol test as part of its investigation into his behavior, notwithstanding his request to consult with his union representative beforehand, the Company engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

3. By suspending and terminating Razi on May 18 and 19, respectively, because of his refusal to submit to the drug and alcohol test without first consulting with his union representative, the Company also engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

REMEDY

The appropriate remedy under the Act for the foregoing violations is an order requiring the Company to cease and desist and to take certain affirmative action. Given the Company's reason for terminating Razi, the latter properly includes a requirement that it offer him immediate and unconditional reinstatement to his former position and make him whole for any

peatedly told him not to clock out because [Henselman] wanted to speak to him (U. Exh. 6).

[19] Compare the employer's termination memo in *System 99*, quoted in part at fn. 14, above, where the Board declined to order reinstatement and backpay (289 NLRB at 723 fn. 3).

[20] Here, like the employees in *System 99* and *Safeway Stores*, Razi clearly had an objectively reasonable belief that his employer's investigation and request to take a drug test could put his job in jeopardy. See generally *Spurlino Materials, LLC*, 353 NLRB 1198, 1240 (2009), reaffd. 355 NLRB 409 (2010), enfd. 645 F.3d 870, 881 (7th Cir. 2011). And there is no contention or evidence that the Union waived the employees' *Weingarten* rights. See *Prudential Insurance Co.*, 275 NLRB 208 (1985); and *Graphic Packaging International v. Steel Workers Local 572*, 2007 WL 2275238 (M.D. Ga. 2007).

[21] In light of this conclusion, it is unnecessary to address the General Counsel's alternative argument that the *Olin* postarbitration deferral standards should be modified to shift the burden to the party seeking deferral. See *IAP World Services*, 358 NLRB 33 (2012) (declining to address the General Counsel's proposed new deferral framework as it would not have led to a different result). See also *Shands Jacksonville Medical Center*, 359 NLRB 918 (2013).

loss of earnings and other benefits. See *Safeway Stores*, *Wal-Mart Stores*, and *Provider Services Holdings*, above.[22] Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Company must also compensate Razi for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. See *Latino Express, Inc.*, 359 NLRB 518 (2012).

In its brief, the Union requests, for the first time, that the Company also be ordered to pay its attorneys' fees and costs for the arbitration of Razi's grievance. However, the Union cites no authority for this remedy. Nor does the Union present any argument why the remedy is appropriate. I find that the matter is therefore best left to be addressed by the Board on exceptions, in any, after a full briefing by all parties.

Accordingly, based on the foregoing findings and conclusions, and the record as a whole, I issue the following recommended Order.[23]

ORDER

The Respondent, Ralphs Grocery Company, Irvine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees to immediately submit to a drug and alcohol test as part of an investigation into their behavior or conduct notwithstanding their request to consult with a union representative beforehand.

(b) Suspending or discharging employees because of their refusal to submit to such a drug and alcohol test without first consulting with a union representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Vittorio Razi full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Razi whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Razi for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to Razi's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Irvine, California, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[22] As noted earlier (fn. 13), there is no contention that Razi should be denied reinstatement and backpay because of his May 19 postdischarge comment to District Manager Haynes.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."